1948.

File No. O. Contract 48

Legal Deptt

A **BRANCH**

Subject:— Opinions under the Indian Contract Act, 1872

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File No. O. Contract/48

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R.C 21/5

19/6

Office of the H.L.A.

Transport charges for labour supplied.

It is presumed that there is no contract executed by Mr. Sausman on behalf of the Governor of Bombay. If so, the claim of Messrs. Rajalee & Co would not, strictly speaking, be legally enforceable against Government. It is, however, for Government to decide whether the claim should be admitted in view of the fact that labour was supplied to Mr. Sausman for executing Government work and, as is rightly observed by the Director of Agricultural Engineering, circumstantial evidence supports the contractor's claim.

Id/-P.M.L.
12/1.
Remembrancer of Legal Affairs.

U.R. to A.R.D.P. No. 386 dated the 15th January 1948.

BKS. 15/6/ 4c.

Office of the R.L.A.

The question raised for the consideration of the R.L.A. is whether a principal and his surety can be legally proceeded against simultaneously "as surety has to pay arrears in case of default by the principal after it is found that it is not possible to recover from him as arrears of land revenue."

2. Section 128 of the Indian Contract Act provides:-

"The liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract."

The words "unless it is otherwise provided by the contract" indicate that it is open to the parties to specially provide that the creditor must exhaust his remedies against the principal debtor or must give notice of default to the surety or must proceed against the sureties first. If no such provision is made in the contract, the surety is not entitled to say that the creditor should exhaust his remedies as against the principal debtor nor is he entitled to notice that the principal debtor has defaulted, for, according to law, it is the duty of the surety to see that the principal pays or performs his obligations. (See Iyer's Law of Contracts, p.351). It follows, therefore, that in the absence of any provision to the contrary in the agreement, it would be open to Government to proceed either against the principal debtor or the surety as soon as a default has been made by the former. Although, therefore, there is no legal objection to Government proceeding against both the principal and the surety simultaneously, whether that course should invariably be followed would naturally depend upon considerations of practical difficulties.

Id/-P.N.L. 16/2
Remembrancer of Legal Affairs.

U.O. to R.D., No. 1641 ,dated the 16th February 1948.

BKS. 15/6/ 4c.

No. 300
Office of the
Remembrancer of Legal Affairs,
Bombay Castle, 10th January 1948.

To

The Commander,
H. Q. Bombay Area,
BOMBAY.

Subject:- Contract for supply of ice at Poona for the period from 1-10-46 to 31-3-47

Sir,

With reference to your letter No.1060 14 St.5Q., dated the 3rd, October 1947, on the above subject, I have the honour to inform you as follows:-

The question whether there is any obligation on the part of a person accepting the tender to place all or any of the orders with the person giving the tender was considered in Rexx Percival Ltd. v. London County Council (1918) 87 L.J. K.B. 677, where the legal position was summed up by Atkin, J. as follows :-

"One known that it is quite common for large bodies that require supplies over a year to ask for tenders and to obtain them and it sometimes happens that the effect of the form of the tender with an acceptance is to make a firm contract by which the purchasing body undertakes to buy all the specified material from the contractor. On the other hand, one knows that these tenders are very often in a form under which the purchasing body is not bound to give the tenderer any order at all. In other words, the contractor offers chooses to give him an order for goods during the stipulated time, then he is under an obligation to supply the goods in accordance with the order; but apart from that nobody is bound.

"There is also an intermediate contract that can be made in which, although the parties are not bound to any specified quantity, yet they bind themselves to buy and to pay for all the goods that are in fact needed by them. Of course, if there is a contract such as that, then there is a binding contract which will be knnnn broken if the purchasing body in fact do need some of the articles the subject of the tender, and do not take them from the tenderer. (See Iyer's Law of Contracts, page 35)".

The terms of the tender for the supply of ice in the present case form part of the agreement. Under clause 1 of the tender, the tenderer agrees to supply the articles specified in the schedule attached thereto as the Commander, Poona Sub-Area, may actually require during the period 1-10-46 to 31-3-47 and it is also further

stated that "in consideration of your agreeing to take from me and from no other contractor the entire amount of supplies which the officer or officers operating the contract may require within the period of the contract (other than such as Government may themselves supply, including produce obtained from soldiers' gardens) and subject to the provisions of clauses 7 and 19 I bind myself not to revoke my tender during the aforementioned period", Ice was not drawn from the contractor by the Military authorities in view of the fact that the requirements of the army were met from the Military Engineering Services arrangements. It is therefore now apparent that the supply was not taken from any other contractor nor was it now actually required since the whole supply was met from the Military Engineering Services arrangements. In the circumstances, the contractor could not have any grievance on the ground that the supply was not taken from him nor could he claim any compensation on the ground of breach of the terms of the contract. He would not, therefore, be legally entitled to any damages.

The papers of the case accompany.

Your obedient servant,

Id/-P.M.L.
Remembrancer of Legal Affairs.

BKS. 15/6/ 4c.

Office of the R.L.A.

Recovery of stipend from Mr. Pathan.

Under an agreement.

The covenant between Mr. Pathan and the Government which embodies the conditions under which Mr. Pathan was to serve Government on the completion of his training was not before the Remembrancer of Legal Affairs when he gave his previous opinion No.9469 dated the 24th September 1947. That opinion was based upon the statement made by the Agricultural Commissioner. Under condition 4 of the covenant it is the Government who has the power, under certain circumstances, to dispense with the services of the covenanter without any notice and without assigning any reasons. The order in that behalf must be made by Government, that it is to say, by or on behalf of the Governor of Bombay. On such order having been passed after due inquiry, the covenantor becomes liable to refund to Government the total cost of his training including the stipends paid to him. The Land Improvement Officer, Muddebihal South Bijapur, had no authority to pass an order dispensing with Mr. Patham's services. Consequently, in the absence of a valid order from Government, under condition 4 of the covenant, the stipend cannot be recovered from Mr. Pathan.

Id/-P.M.L.
23/3
Remembrancer of Legal Affairs.

U.M. to A.& R.D.D. No. 2896 dated the 23rd March 1948.

BKS. 15/6/ 4c.

Office of the R.L.A.

Recovery of a sum from the surety when the principal lost the amount in an unsound state of mind.

It appears that Mr. D.V. Sawant, officiating Talathi Talavade, Rajapur Taluka absconded from duties from 10-2-1947 and he had with him that day a sum of Rs. 427-7-3 out of the advance granted to him by the Collector of Ratnagiri for local purchase of grain. He was later on traced in an unsound condition of mind and has since been admitted in the Mental Hospital, Ratnagiri. He had executed a bond making himself liable to account for public money entrusted to him. He owns no property worth attaching. It is therefore proposed to recover the amount from his surety, Mr. Krishnaji Keshav. The surety, it appears, contends that he is not liable to pay as the principal lost the amount while in an unsound state of mind. The District Government Pleader, Ratnagiri is of the opinion that the amount can be recovered from the surety as an arrear of the land revenue. The R.L.A. is requested to advise whether the amount can be recovered from the surety as an arrear of land revenue.

2. The bond executed by Mr. Sawant and his surety is at page 25 ante. Under that bond, Mr. Sawant is liable to account for public moneys received by him and the surety is also liable to make good the loss, in case Mr. Sawant fails to discharge his liability. Consequently, the surety would ordinarily have been liable to make good the loss of Rs. 427-7-3 and this liability could have been enforced against him under the provisions of the Land Revenue Code but for one difficulty; and that difficulty relates to his liability to pay the amount lost by the principal while in an unsound state of mind. "The Principal must perform the contracts strictly, otherwise the surety will be liable. But the surety will not be liable if there is no default on the part of the

principal; for instance where the principal is charged, as bailee with having received a specific sum of money which he ought to have paid over in a certain time but which he did not pay over, the surety will not be liable if it appeared that the principal lost the money by robbery without any defaultof his own" (See Walker Vs. British Guarantee Association, 1852, 18 Q.B. 277; Chitty's Treties on the Law of Contracts, pages 832-833). That principle may apply in the present case. If it be proved that the loss of the amount by Mr. Sawant is atributable to the unsound state of his mind, the loss could be deemed to have been caused without his volition and therefore without any default of his own in which case the surety would not be liable. If the principal was guilty of no default the surety cannot be liable. No doubt the burden of proving that fact would in the first instance be on the surety. But the fact that Mr. Sawant was traced in an unsound state of mind and has since been admitted in the Mental Hospital raises a presumption that he must have lost the amount while in an unsound state of mind. Consequently, it appears that unless that presumption can be rebutted by cogent evidence it would not be legally feasible to enforce the liability against his surety.

Id/-P.N.L.
26/5
Remembrancer of Legal Affairs.

U.R. to C.J.D. No. 5004 dated the 26th May 1948.

BKS. 15/6 4c.

Office of the R.L.A.

Agreements with purchasers of seed potatoes from Government.

Under section 175(3) of the Government of India Act, 1935, all contracts made in the exercise of the executive authority of the Dominion or of a Province -

(i) shall be expressed to be made by the Governor General, or by the Governor of the Province, as the case may be, and

(ii) all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-General or Governor by such persons and in such manner as he may direct or authorise.

It is no doubt true that the agreements are made in the name of the Governor of Bombay, but since no specific authorisation was made to the Plant Pathologist to Government, the agreements executed by him would be void and would not be enforceable at law. It is presumed that the purchasers of seed potatoes did not make applications to the Plant Pathologist to Government acting on behalf of the Governor. If so, it would be difficult to int infer a concluded agreement by correspondence. Consequently it would not be legally feasible to enforce these agreements.

Id/-P.R.L.
7/6
Remembrancer of Legal Affairs.

U.R. to A.R.D.D., No. 5383 ,dated the 7th June 1948.

BKS. 15/6/ 4c.

No: 4997

Office of the
Remembrancer of Legal Affairs,
Bombay Castle, 26th May 1948.

To

The Commander,
HQ Bombay Area, Colaba,
Bombay 5.

Subject:- Hired M.T. Contract: Payment of Bills.

Sir,

With reference to letter No. 1083/48 ST3B dated 5th April 1948 from Maj. Gen.Comd. Bombay Area, I have the honour to state that security deposit is intended to ensure the fulfilment of the contract. Since the contract in the present case was fulfilled, the contractor was entitled to the return of his deposit. The fact that the contractor submitted a no-demand certificate to warrant the return of his deposit would not deprive him of his right now to bill for work executed but not paid for.

Your obedient servant,

Id/-P.M.L.
25/5
Remembrancer of Legal Affairs.

BKS. 15/6/ 4c.

31 to 37

Office of the R.L.A.

There appears no legal objection to enforcing the security bond against the surety for recovering the actual loss caused by Mr.Thakker to Government subject to the limit of Rs.5000/- ,

Id/-P.M.L.
3/8
Remembrancer of Legal Affairs.

U.R. to C.S.D., No. 7294 ,dated the 3rd August 1948.

BKS. 15/6/ 4c.

Office of the R.L.A.

The Civil Supplies Department may make a formal demand for the immediate payment of the debt and interest and then forward the papers to the Collector of Thana for the recovery of the Government dues as arrears of land revenue in accordance with the provisions of the Bombay Land Revenue Code, 1879.

Id/-P.M.L.
21/8.
Remembrancer of Legal Affairs.

U.R. to G.P.O. No. 425-Genl dated the 4th August 1948.

BKS. 15/6/ 4e.

Clause 1 of the agreement dated 23-9-1943 between Government and Mr. Sadwa provides : "In consideration, etc., the contractor shall have the sole right to cut and remove grass from the closed coupes, except the coupe under exploitation, of S.F.S.VII, S.F.S. VIII and Bandheli Bid specified in the schedule appended hereto and hereinafter referred to as 'the said forest' of Godhra, etc., subject to the conditions hereinafter specified and for a term of 10 years commencing, etc.". Out of the total number of closed ~~xxxx

additional coupes were given to him. In respect of these two coupes -- he would certainly be liable not only for payment of compensation but also for royalty. This question need not be presed at this stage.

2. It appears that there is some difficulty in assigning closed coupes to Mr. Sadwa in conformity with the agreement because of the revised working plan of 10 years introduced since 1939. At the time when this agreement with Mr. Sadwa was entered into, the working plan was already in operation and he could have foreseen the inability of Government to assign to him the particular closed coupes consistently with the revised working plan. In the first place, according to the agreement, all that he is entitled to claim would be 18 closed coupes of S.F.S. VII and VIII and it is open to Government to fix these closed coupes anywhere in that area and assign ~~him~~ them to him. Mr. Sadwa cannot be entitled to demand particular closed coupes in that area. If this demand of his cannot be conceded, it may not be difficult for Government to fulfil the contract by thus fixing the closed coupes in a different area of S.F.S. VII and VIII ~~x~~ so as not to affect the grazing privilege of villagers and assigning ~~him~~ them to him. If he is unwilling to accept these closed coupes in that area and asks for a reference to arbitration, then Government may agree to a reference being made under clause 29. While making that reference, Government may also press its claim for compensation and ~~x~~ royalty in respect of the two additional coupes enjoyed by him for the last five years and include it as one of the points of reference, for the assignment of the two additional coupes to Mr. Sadwa would be considered to be something done under the contract within the meaning of clause 29.

Id/-P.M.L. 30/7
Remembrancer of Legal Affairs.

U.R. to R.D. No. 412-Confl, dated the 30th July 1948.

BKS. 15/6/ 4c.

Office of the R.L.A.

In his last opinion No. 412-Confl. dated the 30th July 1948 the R.L.A. opined that reading clauses 1 and 2 with the schedule it is clear that the contractor is entitled to 20 closed coupes of S.F.S. VII and VIII and 13 coupes of Bandheli Bid, and out of the 20 closed coupes one closed coupe is to be reserved to the villagers for free grazing and one closed coupe under exploitation, and consequently Mr. Sadwa could claim in respect of this contract 18 closed coupes of S.F.S. VII and VIII and 13 coupes of Bandheli Bid. The Divisional Forest Officer, Panch Mahals, in his letter to the Secretary to Government, Revenue Department at p.263 ante observes : "There is one coupe under exploitation every year in each of the felling series. That is there will be two coupes under exploitation from the 'said forests' to be handed over to Mr. Sadwa. I, therefore, presume that Mr. Sadwa is entitled to only 17 coupes (20 coupes minus two coupes under exploitation - one S.F.S. VII and one S.F.S. VIII and one coupe to be handed over to the villagers) in addition to the 13 coupes from the Bandheli Bid i.e. in all 30 coupes." The R.L.A. is requested to reconsider.

This point was fully considered by the R.L.A. when he gave his last opinion No. 412-Confl. dated the 30th July 1948. Under clause 1 of the agreement out of the total number of closed coupe etc. one closed coupe is to be given to the villagers free and the coupe under exploitation shall be excluded and will be notified to the contractor every year and the rest of the closed coupes will be handed over to him on or before the 15th June every year. Reading the words "the coupe under exploitation" with the words "out of the total number of closed coupes" in clause 1 the only reasonable and proper interpretation would be to exclude only one coupe under exploitation out of the total number of closed coupes i.e. 33 as mentioned in the schedule and not one coupe under exploitation in each of the

felling series as stated by the Divisional Forest Officer. It may be so in practice but the wording of the agreement cannot bear out the interpretation tried to be put on the agreement by the Divisional Forest Officer. The H.L.A.'s last opinion needs no modification.

The next question for consideration is whether the contract can be terminated under clause 26 of the agreement by reason of the fact that Mr. Gadwa failed to take possession of the coupes in spite of proper notice.

It is true that the agreement itself does not expressly provide for giving any notice to the contractor but under clause 1 of the agreement the closed coupes excluding the coupe under exploitation and the coupe to be given to the villagers free are to be handed over to the contractor on or before the 15th June every year; and under clause 3 the contractor is required to pay to Government a certain sum of money as royalty annually in one instalment by the 31st August every year. By offering to hand over the coupes to the contractor Government is deemed to have performed its part of the contract and it was up to the contractor to accept possession of the coupes which he has failed to do. Further it is presumed that he must also failed to do. Further it is presumed that he must have also failed to pay the royalty by the 31st August as provided in clause 2. Consequently he can be considered to have committed a breach of clause 1 by implication. There appears no legal objection to terminating the contract under clause 26 by notice in writing to be served upon the contractor and thereafter to re-auctioning the coupes.

Id/-R.T.K.
Remembrancer of Legal Affairs.

U.R. to R.D., No.516-Genfl dated 22nd September 1948.

BKS. 16/6/ 4c.

Office of the R.L.A.

The position of the contractors was that of a bailee and if the Government truck met with the accident and no negligence on the part of the driver can be established, the contractors would not be liable to pay the charges of repairing the truck. Nor would they be liable to pay the hire charges for the period as the truck was not given to them on hire though it was intended to be so taken after it was delivered over to the Executive Engineer, Khandesh Division.

Id/-P.M.L.
23/6
Remembrancer of Legal Affairs.

U.R. to P.W.D., No. 5894, dated the 24th June 1948.

BKS. 16/6/ 4c.

L.D.R.I. No. 10849
Dated 27-8-1948.

Although the circumstances mentioned by the Superintending Engineer in his report dated 18-8-1948 are suspicious, they do not afford any positive proff negligence of the driver.

Id/-R.T.K. 4/10

R.L.A. Id/-P.M.L.
5/10

U. R. to P.W.D.No. 9436 dt. 6-10-1948.

BKS. 16/6/ 4c.

Office of the R.L.A.

Auction sale of mango fruits —— Nasik.

By auctioning the mango fruits for th third time the offer made by Mr. Tile at the second auction was deemed to have been rejected and could not thereafter be accepted unless there was a fresh offer from Mr.Tile. Consequently Mr.Tile would be entitled to the refund of his deposit. Government can however deduct therefrom the loss suffered by Government on account of the removal of fruits by Mr.Tile; but Government cannot claim the difference between the bid at the second auction and the bid at the third aoution.

Id/-P.M.L.
15/11
Remembrancer of Legal Affairs.

U.R. to P.W.D., No. 10682 ,dated the 15th Nov. 1948.

BKS. 16/6/ 4c.

Office of the R.L.A.

Potato contracts entered into by the Plant & Pathologist.

Govt. of India Act, 1935 S. 175(3) and The Indian Contract Act, 1872. SS. 65 and 70.

It is reported by the Director of Agriculture in his endorsement of 25th June 1948 that the amount of Rs. 1,78,000, which is to be recovered from the bonded growers represents the loss sustained by Government owing to the failure of the growers who were supplied with seed potatoes to sell to Government their crops at the end of the season in accordance with the terms of the agreement. It is not included in the amount of Rs. 5, 02,254 to be recovered from them in respect of the seed potatoes, manure etc. supplied to them. In respect of the latter there is no dispute In the same endorsement, the Director of Agriculture has also admitted that the Plant Pathologist to Government was not authorised by Government to execute on behalf of the Governor of Bombay contracts with the cultivators. He has, however, urged that although the formal contracts executed by the Plant Pathologist to Government with the cultivators might be void, a concluded contract can be inferred from the correspondence and the actual conduct of the parties concerned and it should therefore be possible to claim and recover damages for breach of the contract thus concluded between the Plant Pathologist and the cultivators concerned. The question is whether the view of the Director of Agriculture that the contract can still be enforced for recovering damages from the cultivators is correct.

Sub-section (3) of section 175 of the Government of India Act prescribes the manner in which an agreement can be made in the exercise of the executive authority of the Dominion or of a Province. First, it must be expressed to be made by the Governor-General or the Governor of a Province. Secondly, it must be executed on behalf of the

Governor-General or the Governor by such persons and in such manner as he may direct or authorise. It is only when both these conditions are fulfilled that an agreement becomes a contract enforceable at law by or against Government. Even if the contract has not been reduced to the form of a document and is spelt out from letters and correspondence, it must be shown that the correspondence was carried on on behalf and in the name of the Governor and that the contract as finally concluded by correspondence was executed by a person authorised by resolution in that behalf (Secretary of State Vs. Bhagwandas 40 Bom. L.R.,19).

In the present case the Plant Pathologist to Government was not authorised by Government to enter into agreements with the agriculturists in respect of the distribution of potato seeds. ~~Sx~~ Obviously, therefore, his action was unauthorised unless it had been ratified by Government within a reasonable time in which case there would have been a concluded contract enforceable between Government and the cultivators. According to the terms of the specimen agreement at p. 7 the potato seeds were given to the cultivators at a concession rate in 1946 on condition that they should make over one-third or one-fourth of their entire produce to Government at a rate to be fixed later on. Government were entitled under these agreements to claim one-third or ~~xxxxxx~~ one-fourth of the produce during the period from March to June 1947. That period has expired. There is nothing on record to prove that the action of the Plant Pathologist was ratified by Government before the claim under the agreement had matured. Since the performance of the contract was fixed in 1947 the ratification thereof by Government now would not be within a reasonable time. Consequently, it is not legally feasible to claim damages from the cultivators in enforcement of the contracts made by the Plant Pathologists.

Another question which arises is whether, if the contracts are void, Government can claim any damages from

the cultivators under section 65 to 70 of the Indian contract Act. There is no direct authority covering this precise point. But the question seems capable of being resolved on the analogy of the principles governing contracts made on behalf of municipal corporations. The ~~xt~~ weight of authority seems to be in favour of the view that where there is an express statutory provision prescribing the manner in which a contract must be made on behlaf of a municipal corporation, for example, where the statute expressly provides that the contract shall be ~~xx~~ signed by the chairman or two councillors or shall be under the corporate seal, non-compliance with that provision renders the contract void inits inception and no compensation can be claimed for any executed consideration under section 65 or section 70 of the Indian Contract Act. [see (1883) 8 A.C. 517; I.L.R. 27 All. 592; I.L.R. 43 Cal. 790; ~~xx~~ A.I.R. 1932 Oudh 193 F.B. A.I.R. 1933 Madras, 332, 36 Bom. L.R. 568 -600-601] On the whole, therefore, the chances of Government are not very hopeful if the cultivators resist Government's demand in a Court of law.

Id/-P.M.L.
20/9
Remembrancer of Legal Affairs.

U.R. to A. & R.D.D. No. ~~St~~ 8949 Dated 21st September 1948.

BKS. 16/6/ 4c.

Office of the R.L.A.

Whether the liability of a surety under sec.126 of the Contract Act extends to any charge on his property.

The view expressed by the Conservator of Forests is not correct. The surety bond creates only a personal liability and not a charge on the property of the surety. Consequently the surety bond would not preclude the surety from disposing of his property during the contract period.

Id/-P.M.L.
14/12
Remembrancer of Legal Affairs.

U.R. to R.D., No. 11858 ,dated the 14th December 1948

BK3. 16/6/ 4c.